Nos. 93-1456 and 93-1828

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,
v.
RAY THORNTON, *et al.*,
Respondents.

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,
v.
BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF RESPONDENTS BOBBIE E. HILL, ON BEHALF OF THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, AND DICK HERGET

ELIZABETH J. ROBBEN
Counsel of Record
JEFFREY H. MOORE
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AK 72201-3493
(501) 376-2011

LOUIS R. COHEN
W. HARDY CALLCOTT
ROBERT F. HOYT
PETER B. HUTT II
ERIK H. CORWIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Respondents Bobbie E. Hill, on Behalf of the League of Women Voters of Arkansas, and Dick Herget

October 17, 1994

56 pp

QUESTIONS PRESENTED

1. Whether a state may add to the qualifications for service in Congress expressly prescribed in the Constitution.

2. Whether a state may bar from the ballot for election to Congress, for life, constitutionally qualified candidates who have complied with all federal and state requirements relating to the election process.

RULE 29.1 LISTING

Respondent the League of Women Voters of Arkansas is a non-profit corporation incorporated under the laws of the State of Arkansas. It has no parent companies or subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATE CASES

TABLE OF AUTHORITIES—Continued

FEDERAL CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1456

U.S. TERM LIMITS, INC., *et al.*,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

No. 93-1828

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF RESPONDENTS BOBBIE E. HILL, ON BEHALF OF THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, AND DICK HERGET

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Arkansas Term Limitation Amendment, Amendment 73 to the Constitution of Arkansas, and of the United States Constitution are set forth in the Appendix to this Brief.

STATEMENT

The Constitution deals comprehensively with elections to Congress. With respect to the House of Representatives, it provides that: (1) "Members [shall be] chosen every second Year" (Art. I, § 2, cl. 1); (2) the choice shall be made "by the People of the several States" (*id.*); (3) Members must meet three specified qualifications (*id.*, cl. 2); (4) a vacancy is to be filled by the "Executive Authority" of the state (*id.*, cl. 4); (5) the states shall prescribe the "Times, Places and Manner" of holding elections, but Congress may at any time "make or alter" such regulations (*id.*, § 4, cl. 1); (6) the House shall be the "Judge of the Elections, Returns and Qualifications of its own Members" (*id.*, § 5, cl. 1); and (7) the House may "with the Concurrence of two thirds, expel a Member" (*id.*, § 5, cl. 2). Similar provisions govern elections to the Senate.[1]

This case concerns the constitutionality of Section 3 of an initiative styled the "Arkansas Term Limitation Amendment" to the Arkansas Constitution (the "Arkansas Measure"), which was adopted in November 1992. The Preamble to the Arkansas Measure declares that "elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people" and that "entrenched incumbency . . . has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." The Preamble then describes the Measure as follows: "Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials." *See* App. 1a *infra.*

The Arkansas Measure provides that any person elected from Arkansas to three or more terms in the U.S. House

[1] Art. I, § 3 provided that the Senators from each state would be "chosen by the Legislature thereof," but the Seventeenth Amendment now provides that the Senators from each state shall be "elected by the people thereof . . . ."

of Representatives, or two or more terms in the Senate, "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the [Chamber in which he or she served]." The terms need not be consecutive, and the bar is for life.

Respondent Bobbie E. Hill, an Arkansas voter and past president of the League of Women Voters of Arkansas (the "League"), individually and on behalf of the League, and respondent Dick Herget, an Arkansas voter, individually and on behalf of others similarly situated, brought this case in the Circuit Court of Pulaski County, Arkansas. They alleged that the Arkansas Measure is an invalid attempt to add to the qualifications set forth in the Constitution for service in Congress and that it also violates the First and Fourteenth Amendments. The circuit court (Piazza, J.) rejected the First and Fourteenth Amendment claim, *see* No. 93-1456 Pet. App. 60a,[2] but held that "the initiative pertaining to federally elected officials is unconstitutional by virtue of the qualifications clause of the United States constitution and the doctrine of federal supremacy." *Id.* 52a. The court explained that limited prior service "is as much a qualification as wealth, position or poverty. This is a power given by the whole body politic to the Constitution which cannot be usurped by individual actions of the several states." *Id.* 49a.

The Arkansas Supreme Court affirmed. The plurality opinion by Justice Robert L. Brown for three justices

[2] The court rejected a claim that other portions of the Measure, setting term limits for *state* offices, violated the right of association protected by the First and Fourteenth Amendments, explaining that "the people of this State have the power to limit the terms of the state legislature and executive branch." No. 93-1456 Pet. App. 49a-50a. The court did not explain its rejection of the First and Fourteenth Amendment claim as applied to the exclusion from the ballot of qualified candidates for federal office.

The court also held that the Arkansas initiative was invalid in its entirety under Arkansas law for lack of an "Enacting Clause." No. 93-1456 Pet. App. 47a, 54a-60a. This ruling was subsequently reversed by the Supreme Court of Arkansas. *Id.* 9a-11a.

concluded that "[q]ualifications set out in the U.S. Constitution [are] unalterable except by amendment to that document" (*id.* 14a); it rejected "[t]his effort to dress eligibility to stand for Congress in ballot access clothing" on the ground that "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." *Id.* 14a-15a. Justices Gerald P. Brown and Dudley concurred in separate opinions. Justices Hays and Cracraft dissented, the former on the ground that the constitutional qualifications are only "minimum qualifications," *id.* 35a, and the latter on the ground that "the Qualifications Clauses protect only the right of a person . . . to be seated in the Congress if elected. They do not address the right of any person to seek election or that of his constituents to vote for the person of their choice." *Id.* 38a-39a.

SUMMARY OF ARGUMENT

The Constitution provides a clear and sensible framework for the election "by the people" of persons to serve in Congress. It sets forth express lists of qualifications for service in each House and makes each House the final judge of its members' qualifications. By clearly evidenced and long-accepted implication, it bars both Congress and the states from adding qualifications. It gives the states the power, under the Times, Places and Manner Clause, to regulate the election process, and it adds that "the Congress may at any time by Law make or alter such Regulations." Under that Clause, the states and Congress have broad power to assure fair and orderly elections, but neither has the power to bar or hobble qualified candidates who are disfavored for reasons unrelated to the election process. To the best of our knowledge, every decision of every court since the founding of the Nation is consistent with this framework.

In their zeal to keep persons with extensive prior service out of future Congresses without following the prescribed procedures for amending the Constitution, petitioners and other advocates of term limits urge two fundamentally new interpretations, each of which would open the congressional qualification process to a wide range of future tampering by both the states and Congress.[3]

First, petitioners argue that the states may add qualifications to those set forth in the Constitution. But this argument is contrary to the Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), which rested on the Court's conclusion, after extensive analysis, that the qualifications are "fixed in the Constitution." 395 U.S. at 540. The *Powell* conclusion is equally applicable to the states: petitioners' argument that the qualifications are fixed as against Congress but somehow open to supplementation by the states defies the constitutional text, logic, and a lot of history. If the Court were to reconsider *Powell*, it would find that the English background, the debates at the Constitutional Convention, the ratification debates, and subsequent congressional, scholarly and judicial analysis together demonstrate overwhelmingly that the Founder generation understood that the Constitution bars state attempts to add qualifications.

Second, petitioners argue that the Arkansas Measure is not a qualification but a permissible state regulation of the "Times, Places and Manner" of elections under Art. I, § 4, because the Measure leaves what the Arkansas court described as "faint glimmers of opportunity"—the ability to run a write-in campaign. Pet. App. 15a. But however it is labeled, the Measure is an express attempt to exclude persons from Congress because they lack the qualification of limited prior experience. A state has no power (under Art. I, § 4 or otherwise) to regulate the manner of elections so as to hinder candidates who *are* qualified, merely because the state believes they possess

---

[3] We will refer to the briefs of petitioners and their amici as follows: State of Arkansas (State Br.); US Term Limits et al. (USTL Br.); Republican Party of Arkansas et al. (RPA Br.); Dickey and Hutchinson (DH Br.); Washington Legal Foundation et al. (WLF Br.); Citizens United Foundation et al. (CUF Br.); State of Nebraska et al. (Neb. Br.).

personal characteristics that render their service undesirable.

ARGUMENT

The Constitution bars the states (and Congress) from adding to the qualifications for service in Congress. The Arkansas Measure is an invalid attempt to add the qualification of limited prior experience: its stated purpose is to limit the terms of Senators and Representatives to specified lifetime allowances. If, instead, the Measure is viewed as an attempt to regulate "ballot access," it is nevertheless invalid, because a state has no power to exclude from the ballot a congressional candidate who *is* qualified, and who has complied with all election-related requirements for listing on the ballot, in order to make it harder or impossible for that candidate to win.

I. THE CONSTITUTION BARS STATES (AND CONGRESS) FROM ADDING TO THE QUALIFICATIONS FOR SERVICE IN CONGRESS

The Constitution provides that Representatives shall be "chosen every second Year by the People"[4] and Senators shall be "elected by the people."[5] It lists qualifications for each office, and it bars both Congress and the states from adding new qualifications because, in Hamilton's words, "the people should choose whom they please to govern them."[6] A state might assert plausible policy reasons for disqualifying any person who was not born in the state, or has not served in the state legislature, or has exhausted an allowed period of service, but the Constitution forbids it from imposing any such qualification.

---

[4] U.S. Const. Art. I, § 2, cl. 1.

[5] U.S. Const. Amend. XVII.

[6] 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot 2d ed., 1836) [hereinafter "Elliot's Debates"], *quoted in Powell v. McCormack*, 395 U.S. 486, 547 (1969).

A. *Powell v. McCormack* Decided That the Qualifications Set Forth in the Constitution Are Exclusive

This Court has already decided the central question in this case. In *Powell v. McCormack*, 395 U.S. 486 (1969), the Court considered whether the House of Representatives could exclude a Member because of personal misconduct. The Court held:

> [T]he House [is] without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.

395 U.S. at 522 (emphasis deleted). That holding was squarely based on what the Court called "the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." *Id.* at 540.

Petitioners argue that *Powell* either (i) interpreted only the power of Congress and not that of the states or (ii) interpreted only the power of each House under Art. I, § 5 as "the Judge of the . . . Qualifications of its own Members" and has no bearing on the power of the states or Congress to add qualifications. These arguments are, first of all, illogical. (i) Like other lists, the constitutional qualifications might grammatically have either a "closed" meaning (precluding additions) or an "open" meaning (allowing additions), but nothing in the constitutional text suggests that they might have different meanings depending on which body is seeking to add to them. (ii) If each House is "the Judge" of its members' qualifications but is confined to those "expressly prescribed in the Constitution," 395 U.S. at 522, then a House could not judge any qualification Congress or a state might add —but permitting addition of a qualification of which a House is *not* "the Judge" would flatly contradict the constitutional text.

Petitioners' arguments are also inconsistent with what *Powell* said. The *Powell* Court's exhaustive analysis focused on whether the constitutional lists were closed or open-ended, and its decision rested on the conclusion that

they were closed. The Court began with, and relied heavily on, the Wilkes episode and its apparent impact on the Constitutional Convention. The Court noted that the episode had established in England that

> the law of the land had regulated the qualifications of members to serve in Parliament, and that the freeholders . . . had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws . . . [which are] not occasional but fixed.

Id. at 534 n.65. The Court then said that Madison made a "striking[ly]" similar argument to the Convention on August 10, 1787, which thereupon "fac[ed] and then reject[ed] the possibility that the legislature would have power to usurp the 'indisputable right of the people to return whom they thought proper.'" *Id.* at 535. The point of the Court's recital was that the Convention had been persuaded that congressional qualifications should be established in "the law of the land" and "fixed."

The Court also relied heavily on Hamilton's view of "the immutability of the qualifications set forth in the Constitution," 395 U.S. at 540, and noted that "Madison had expressed similar views in an earlier essay [*The Federalist* No. 52], and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue." *Id.* Again, the Court's point, on which the *Powell* decision was based, was that the Founders viewed the Constitutional qualifications as immutable.[7]

The *Powell* Court also relied, 395 U.S. at 542-43, on the 1807 determination by a House Committee of Elections that Rep. William McCreery should be seated, notwithstanding his failure to satisfy a *state*-added require-

[7] The Court gave no hint that it thought the qualifications could somehow be "immutable" vis-a-vis Congress but not vis-a-vis the states, and any such suggestion would have run counter to the very evidence the Court was citing. *The Federalist* No. 52 (Jacob E. Cooke ed., 1961), discussed at pages 15-16 *infra*, clearly expresses Madison's view that the "regulation" of qualifications by the Constitution itself protected the national government against *state* tampering.

ment of residence within his congressional district, because the qualifications for service are determined in the Constitution "'without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications.'" [8] The Court quoted the Committee's chairman, who explained that "'neither the State nor the Federal Legislatures are vested with authority to add to [the Constitution's] . . . qualifications, so as to change them.'" [9] The point of the Court's recital (and the only possible relevance of the McCreery episode) was to demonstrate the historic understanding that the Constitution precludes the addition of qualifications by states and *therefore* by Congress; that is what the Court thought it was deciding in *Powell*.[10]

Finally, the *Powell* Court relied on the "fundamental principle of our representative democracy . . . in Hamilton's words, 'that the people should choose whom they please to govern them.'" 395 U.S. at 547. That principle is the same whether Congress or a state seeks to restrict the people's choice. It would be violated by a state limitation of candidacy to short-termers, or lifetime residents of the state, or college graduates, or persons with state legislative experience—any of which would presumably be permissible if states could add qualifications. The Court's reliance on that principle in *Powell* is further evidence that what the Court itself thought it was deciding

[8] *Powell*, 395 U.S. at 542 (quoting 17 *Annals of Cong.* 871 (1807)).

[9] *Id.* at 543 (quoting 17 *Annals of Cong.* 872).

[10] The Court referred, at one point in its discussion of McCreery, to the "more narrow issue of the power of the States to add to the standing qualifications . . . ." *Id.* at 543. The Court may have meant that it would be *easier* to reject a state attempt to add a qualification, because states do not have the power possessed by each House to judge qualifications.

Petitioners argue (*e.g.*, State Br. 47) that the McCreery episode is less convincing evidence than the *Powell* Court took it to be. But the Court's use of the episode shows that it meant to rest its decision in *Powell* on the fact that the qualifications are "fixed in the Constitution."

in *Powell* was that the qualifications for Congress are contained in "the law of the land." 395 U.S. at 534 n.65.

Two terms ago, in *Nixon v. United States*, 113 S. Ct. 732, 739-40 (1993), the Court interpreted its *Powell* ruling, answering the precise question presented here. The Court said, 113 S. Ct. at 740, "Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2"—the Qualifications Clause for the House—*not*, as petitioners here contend, Art. I, § 5, which gives the House the power to judge qualifications. The point was important: the petitioner in *Nixon* was arguing that a ruling that the Senate had unreviewable discretion to choose impeachment procedures (under Art. I, § 3, cl. 6) would be inconsistent with *Powell*'s determination that the House did *not* have unreviewable discretion (under Art. I, § 5) to judge Members' qualifications. The Court responded that *Powell* did not rest on Art. I, § 5, but rather on "the existence of this separate provision [Art. I, § 2] specifying the only qualifications which might be imposed for House membership." *Id.*[11]

In sum, the Constitution sets forth a list of qualifications for service in the House, and this Court determined in *Powell*, after an extensive review of the historical record, that the Founders meant that list to be exclusive. The force and consequences of that interpretation of the constitutional text do not depend on whether it is Con-

[11] Other decisions of this Court are consistent with our reading of *Powell* and with *Powell's* continuing validity. A year after *Powell*, Justice Black, sitting as Circuit Justice in *Davis v. Adams*, 400 U.S. 1203, 1204 (1970), said that Florida had "exceeded its constitutional powers" by adding to "the qualifications established by federal law for candidates for federal office." *Storer v. Brown*, 415 U.S. 724 (1974), held only that certain regulations of the election *process* did not constitute qualifications for service and therefore did not raise a *Powell* issue. (*Storer* is further discussed at pages 30-31 and 35-36 below.) And *Buckley v. Valeo*, 424 U.S. 1, 133 (1976), held only that the power of Congress under Art. I, § 5 to judge qualifications did not give it the power to create a federal agency whose structure violated the Appointments Clause; qualifications for service in Congress were not at issue.

gress or a state that is seeking to add to the exclusive list.[12]

B. The *Powell* Court's Interpretation of the Constitution Was Correct

If the Court were now to reconsider *Powell*, it would be forced to the same conclusion. Together, the English context, the Convention proceedings, the ratification debates, congressional, judicial and scholarly views, and the fundamental principle on which the Founders were acting demonstrate overwhelmingly that a state may not add qualifications.

1. *The Founders Believed That the Constitutional Qualifications Are Exclusive and Unalterable by the States*

The Convention. To begin with, it is undisputed that the Founders considered and rejected inserting congressional term limits in the Constitution itself. The "Virginia Plan" would have made Representatives ineligible for reelection for a number of years after their terms and the President permanently ineligible.[13] On June 12, 1787, however, the Convention voted unanimously to remove congressional term limits from the Virginia Plan,[14] and later the presidential term limit was removed as well.[15]

[12] 395 U.S. at 543. Many courts, including the court below, have noted that *Powell* necessarily means that the states are also barred from adding to the qualifications stated in the Constitution. *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 356 (Ark. 1994); *see also Stumpf v. Lau*, 839 P.2d 120, 122-23 (Nev. 1992); *Joyner v. Mofford*, 706 F.2d 1523, 1528-30 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980); *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1077 (W.D. Wash. 1994); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 831 (N.D. Ga.), *aff'd mem.*, 992 F.2d 1548 (11th Cir. 1993); *Stack v. Adams*, 315 F. Supp. 1295, 1297-98 (N.D. Fla. 1970).

[13] 1 *The Records of the Federal Convention of 1787*, at 20-21 (Max Farrand rev. ed., 1974) [hereinafter "Farrand"].

[14] 2 *Farrand* 217.

[15] *See id.* at 497-502, 522-28.

It is clear beyond a reasonable doubt that the Founders believed that the qualifications that *were* set forth in the Constitution would be exclusive. As noted above, the background was set by the Wilkes episode, which "had a significant impact in the American colonies," and which determined that qualifications were regulated by "the law of the land" and were "not occasional but fixed." [16] Against this background, on August 10, 1787, the Convention debated (i) the Committee of Detail's proposal that the Constitution should give Congress the authority to establish property qualifications for service in Congress and (ii) Gouverneur Morris' proposal to grant the same authority without limiting it to property, so as "to leave the Legislature entirely at large." Both proposals were defeated.[17]

Two points about this debate are clear. First, the extended discussion of these proposed grants of authority made no sense, from any point of view, unless the common assumption was that without such grants the qualifications set forth in the Constitution were exclusive. Second, Madison argued to the Convention in terms this Court called "striking[ly]" parallel to the arguments made for Wilkes,[18] and he prevailed. According to Madison, "The qualifications of electors and elected were funda-

[16] *Powell*, 395 U.S. at 530; *id.* at 528, *quoting* 16 Parl. Hist. Eng. 589, 590 (1769). The Court elsewhere described the issue as "Could the Commons put in any disqualification, that is not put in by the law of the land." 395 U.S. at 528 n.54 (quotation marks and citation omitted).

[17] 2 *Farrand* 249-51; *see Powell*, 395 U.S. at 535.

[18] *Powell*, 395 U.S. at 534. Madison appears to have alluded to the Wilkes episode, stating that "the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention." 2 *Farrand* 250; *see also Powell*, 395 U.S. at 535 & n.68. As the *Powell* Court noted, *id.*, Madison may also have been referring to the Parliamentary Test Act bar to Catholics serving in Parliament; the Court's suggestion is further evidence that *Powell* was concerned with legislative bans against classes of persons, not just with a legislature's power to judge qualifications.

mental articles in a Republican Govt. and ought to be fixed by the Constitution." [19] As the Court said in *Powell*, 395 U.S. at 535-36, the Framers faced and rejected the suggestion that the constitutional qualifications be open to later additions.

Petitioners contend (*e.g.*, USTL Br. 40-41) that Madison (and by inference the Convention) was opposed only to *Congress* having the power to set qualifications. But, first, this argument is unsupported by Madison's text; his concern about the possibility of partisan manipulation applies equally to qualifications imposed by states or Congress, and *The Federalist* No. 52 makes clear that Madison's fear on this point extended to the states.[20] Second, if the Convention meant, "The listed qualifications may not be supplemented by Congress, but may be supplemented by the States," it utterly failed to say so; nothing in the constitutional text will bear such a reading. Third, there is no evidence whatsoever, in the Convention debates or the ratification debates, that anyone thought the states would have the power to add qualifications.[21]

[19] 2 *Farrand* 249-50. Madison further argued that unless they were fixed in the Constitution, "[q]ualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans of [a weaker] faction." *Id.* Hugh Williamson of North Carolina agreed with Madison, arguing that if the qualifications were not fixed in the Constitution and if a majority of some future Congress were lawyers, they could require that only lawyers could become members of Congress. *Id.* at 250.

[20] *See* pages 15-16 *infra*.

[21] The State of Arkansas (Br. 41-42 n.43) notes that James Wilson opposed granting Congress the power to establish property qualifications because granting "this particular power would constructively exclude every other power of regulating qualifications." 2 *Farrand* 251. But (i) Wilson's theory of interpretation supports our view that the constitutional listing of some qualifications bars the "occasional" addition of others, and (ii) as noted in the text, the entire debate about granting Congress this power makes no sense on the State's view. John Dickinson, a Convention delegate from Delaware, also articulated an "expressio unius" theory of interpretation. *Id.* at 123 (stating that a "partial" list of qualifi-

Petitioners also contend (*e.g.*, State Br. 41) that the following passage in Edmund Randolph's notes, which they assert reflect proceedings in the Committee of Detail, supports their position:

> The qualifications of (a) delegates shall be the age of twenty five years at least: and citizenship: (and any person possessing these qualifications may be elected except).[22]

Their argument is that the absence of the words in the last parenthesis from the final text of the Constitution reflects a decision to allow later additions to the constitutional qualifications. But there is no conclusive evidence (i) that the Randolph passage reflects a proposed text considered by the Committee, or (ii) that the Committee advertently deleted the parenthetical words, or (iii) if so, whether the words were deleted as incorrect or superfluous.[23]

The Republican Party of Arkansas (Br. 5-6) also seeks to resurrect an argument based on the Committee of Style's decision to word the Qualifications Clauses negatively instead of positively. The *Powell* Court rejected precisely this argument, noting, *inter alia*, that this committee was not empowered to make substantive changes to the Constitution. 395 U.S. at 537-39 & n.73; *accord Nixon*, 113 S. Ct. at 737.

cations "would by implication tie up the hands of the Legislature from supplying the omissions").

[22] 4 *Farrand* 39 (emphasis omitted, footnote omitted); *see also* 2 *Farrand* 139.

[23] One possible explanation for the deletion is that the Committee had been charged to draft a property qualification, *see* 2 *Farrand* 124-25, but could not agree on such a qualification, *see id.* at 249 (statement of Mr. Rutledge). The Committee proposed instead to empower Congress to deal with the matter, which meant it had to delete the parenthetical language. This explanation is supported by the fact that Randolph made and later crossed out the following marginal note at the precise point where the language at issue appears: "qu: if a certain term of residence and a certain quantity of landed property ought not to be made by the convention further qualifications." *See* 4 *Farrand* 39 n.7; *see also* 2 *Farrand* 189 n.7. The Committee's proposal to give Congress the power to establish property qualifications was, as we have noted, later defeated.

Ratification. Events during ratification further confirm that the general understanding was that the constitutional qualifications were exclusive. To begin with, Madison could hardly have been clearer:

> The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. [Madison describes the express qualifications.] Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.

The Federalist No. 52, at 354 (Jacob E. Cooke ed., 1961).[24] Hamilton agreed with Madison, noting in *The Federalist* No. 60 that the "qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution and unalterable by the legislature."[25]

The State argues (Br. 45-46 n.48) that Madison's statement in *The Federalist* No. 52 is "best seen as ad-

[24] Madison noted in *The Federalist* No. 53, at 365, that some members of Congress "will by frequent re-elections, become members of long-standing" and because they "will be thoroughly masters of the public business" would be less likely than inexperienced members "to fall into the snares that may be laid for them." Hamilton expressed specific opposition to congressional term limits during the ratification debates. *See* 2 *Elliot's Debates* 320; *cf. The Federalist* No. 72 (Hamilton's argument against presidential term limits).

[25] *The Federalist* No. 60, at 409. The State argues (Br. 45) that the qualifications of "electors" were not in fact fixed, and suggests that Hamilton's views about the qualifications of the "elected" are therefore not to be trusted. But the premise is wrong. Both Hamilton and Madison believed that the Constitution *had* "fixed"

dressed to Congress." But, first, there is no evidence that Madison thought the constitutional lists could have a preclusive meaning in one context and an open meaning in another. Second, the context and language of the passage make it clear that Madison was in fact addressing state-added qualifications. He had just finished saying, with respect to *voter* qualifications, that there had been concern about "render[ing] too dependent on the state governments that branch of the federal government which ought to be dependent on the people alone [i.e., the House]" but that the Convention was forced by the diversity of existing state arrangements to adopt the "most numerous Branch" compromise of Art. I, § 2. Madison then immediately contrasted *member* qualifications, which "being . . . more susceptible of uniformity, have been very properly considered and regulated by the convention." The reference to "uniformity" and Madison's whole train of thought make no sense if the passage is viewed as "addressed to Congress." Finally, Madison's statement that "under these reasonable limitations, the door . . . is open to merit of every description" would of course be false if states could add qualifications.[26]

---

the qualifications of House "electors" (albeit not uniformly), by tying these qualifications to the qualifications for electors of the "most numerous Branch" of the state legislature (*see* Art. I, § 2), which according to Madison were "fixed by the State constitutions" and unlikely to be changed. Madison explains the point at length in *The Federalist* No. 52.

[26] Madison repeated his theme in *The Federalist* No. 57, writing:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

The Federalist No. 57, at 385. *The Federalist* No. 52 also demonstrates that USTL's argument (Br. 36) based on the power of the states to define citizenship and inhabitancy is a non sequitur. The states were *not* free to define these terms in some special way for purposes of Art. I, §§ 2-3. As Madison makes clear, the Convention well understood how to leverage the fact that states would be tied to their own general definitions.

Petitioners simply ignore the significance of the controversy, during the ratification debates, over the Founders' decision not to impose term limits in the Constitution itself. Opponents of ratification complained that, without term limits, Congress and the President would become an aristocracy.[27] Their argument was explicitly based on the understanding that under the Constitution the states would not be able to impose term limits on their representatives in Congress.[28] No proponent of ratification attempted to blunt this criticism by arguing that states could set term limits or other added qualifications; instead, Federalists responded that term limits would abridge the "natural right" of the people by depriving them of the freedom to select the representatives they preferred.[29] In

---

[27] Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 520-22 (1969); Erik H. Corwin, Recent Development, *Limits on Legislative Terms: Legal and Policy Implications*, 28 Harv. J. on Legis. 569, 582-87 (1991); *see also The Complete Anti-Federalist* § 2.8.147 (Herbert J. Storing ed., 1981) (letter of "The Federal Farmer" in support of term limits); *id.* § 2.9.201 (essay of "Brutus" in support of term limits). Elbridge Gerry, who attended the Convention, declined to sign the Constitution and became a leading Anti-Federalist in part because of "the duration and re-eligibility of the Senate" and the failure to impose a term limit on the President. Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 14-15 & n.71 (1992) (quoting *Anti-Federalists Versus Federalists: Selected Documents* 1-2 (John D. Lewis ed., 1967)).

[28] *See The Complete Anti-Federalist*, *supra* n.27, § 3.11.48 (Dissent of the Minority of the Convention of Pennsylvania, Dec. 18, 1787) ("For the moderate exercise of this power, there is no controul left in the state governments, whose intervention is destroyed"); *id.* § 3.8.3 (Letter by an Officer of the Late Continental Army, Nov. 3, 1787) ("Rotation, that noble prerogative of liberty, is *entirely excluded* from the new system of government") (emphasis added).

[29] John Adams defended the Constitution's omission of term limits, in his 1787 *Defence of the Constitutions of Government of the United States of America*, using language that plainly assumes preclusion of both congressional and state attempts to add them:

> rotation . . . is a violation of the rights of mankind; it is an abridgement of the rights both of electors and candidates. There is no right clearer, and few of more importance, than

sum, both sides understood that the Constitution as written barred states from imposing term limits; no one on either side suggested that the Constitution permitted states to impose term limits.[30]

Early State Actions. Contrary to petitioners' arguments, the behavior of the states in the ratification and post-ratification periods generally confirms their understanding that the Constitution barred state-imposed additional qualifications, including term limits. In 1790, Pennsylvania removed the state constitutional provision that had limited the terms of its representatives in the Confederation Congress, and would have limited terms of service in Congress, apparently because the provision was inconsistent with the new Constitution.[31] Not a single state

---

that the people should be at liberty to choose the ablest and best men, and that men of the greatest merit should exercise the most important employments[.]

6 *Works of John Adams* 52-53 (Charles F. Adams ed., 1851). Robert Livingstone made a similar argument in his Address to the New York Ratification Convention, *see* 2 *Elliot's Debates* 292-93.

[30] To the contrary, proponents of term limits sought unsuccessfully to change the text of the Constitution. The Virginia and North Carolina ratifying conventions proposed that the Constitution be altered to provide that members of Congress "should, at fixed periods, be reduced to a private station." 3 *Elliot's Debates* 657-58 (Virginia); 4 *Elliot's Debates* 243 (North Carolina). New York proposed that the Constitution be amended to prevent Senators from serving "more than six years in any term of twelve years." 1 *Elliot's Debates* 330. The First Congress considered and rejected a constitutional amendment limiting representatives to three terms during any eight-year period. *See* 1 *Annals of Cong.* 790 (1789).

[31] On March 24, 1789, the Pennsylvania General Assembly passed a resolution calling for an immediate constitutional convention to revise the state's 1776 constitution, which provided that "no man shall sit in congress longer than two years successively, nor be capable of re-election for three years afterwards." Pa. Const. of 1776, ch. II, § 11. According to the resolution, immediate action was required because "the burdens and expenses of the present form of government are with difficulty born, and *various instances occur wherein this form is contradictory to the constitution of the United States.*" *The Proceedings Relative to Calling the Conventions of 1776 and 1790*, at 129 (1825) (emphasis added). The 1790 constitution that emerged from the convention did not include congressional term limits.

attempted to impose term limits on its members of Congress, although more than half imposed term limits on some state offices,[32] several had imposed restrictions on the terms of their delegates to the Continental Congress,[33] and three had called for term limit amendments to the constitutional text.[34]

Petitioners stress Virginia's 1788 adoption of a property qualification for members of its congressional delegation.[35] But the significant facts are that (i) no other state attempted to impose such a qualification, although virtually all states then imposed property qualifications for state offices,[36] and (ii) the Virginia provision was replaced in 1813 by a provision stating that candidates for the House of Representatives need only be "qualified according to the Constitution of the United States," [37] an explicit reference suggesting that Virginia had recognized that the prior law was unconstitutional.

Finally, petitioners assert that there were numerous other early state attempts to impose qualifications, but their examples prove very little. Some citations are to neutral election procedure requirements that do not implicate the present question at all.[38] Others are to statutes

---

[32] *See* Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 415, 417 (1992).

[33] *See id.*

[34] *See* n.30 supra.

[35] *See* Va. Act of Nov. 20, 1788, ch. 2, § 2.

[36] *See* Charles Warren, *The Making of the Constitution* 416-17 (1928) (listing state property qualifications).

[37] Va. Act of Feb. 6, 1813, ch. 23, § 2.

[38] *See* USTL Br. 26, *citing* N.J. Act of Nov. 21, 1788, ch. 341, § 3 (establishing a preliminary nominating process); Conn. Res. of Oct. 9, 1788 (same).

regulating the qualifications for state office,[39] or the conduct of persons who hold state office,[40] both matters within a state's competence that do not bear on the present question. *See* pages 38-40 *infra*. A few states imposed requirements of residence in the Member's district (whereas the Constitution requires only residence in the state) or a specified period of residence in the state; these were indeed unconstitutional, as every court to consider them has found.[41] But the mistakes seem natural (the Constitution did not provide for districts at all); and in any event, there is no evidence that any state legislature focused, when it created these requirements, on the fact that it was adding to the constitutional qualifications.

Jefferson. As petitioners note (*e.g.*, USTL Br. 33 n.51), one important member of the Founder generation, Thomas Jefferson, expressed the view in an 1814 letter to Joseph Cabell that a state could vary the constitutional

[39] *See* State Br. App. C, *citing, e.g.*, Ala. Const. Art. 5, § 11 (1819) (no federal officer shall serve as state judge); Del. Const. Art. 3, § 8 (1792) (no member of Congress shall serve as a state judge); Pa. Const. Art. 1, § 18 (1790) (no member of Congress shall serve in state legislature); S.C. Const. Art. 1, § 21 (1790) (no federal officer shall serve in state legislature); Tenn. Const. Art. 5, § 3 (1796) (federal officers not eligible to serve as state supreme court justices).

[40] *See* State Br. App. C, *citing, e.g.*, Mich. Const. Art. 4, § 18 (1850) (no member of state legislature may accept appointment as U.S. Senator); Minn. Const. Art. 6, § 11 (1857) (during continuance in state office, state judge may not run for federal office).

[41] *See Dillon v. Fiorina*, 340 F. Supp. 729 (D.N.M. 1972) (two-year residence requirement within state unconstitutional); *Exon v. Tiemann*, 279 F. Supp. 609 (D. Neb. 1968) (three-judge court) (district residency requirement unconstitutional); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (N.M. 1968) (same); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958) (same); *cf. Strong v. Breaux*, 612 So. 2d 111, 112 (La. Ct. App.) ("[t]he qualifications prescribed by [the Qualifications] clause are exclusive and neither a state constitution nor state law can add to nor take away from such qualifications"), *cert. denied*, 604 So. 2d 584 (1992).

qualifications.[42] But Jefferson, who was in Paris in 1787 and did not attend the Convention, noted in the same letter that his earlier opinion had been to the contrary and added, "on so recent a change of view, caution requires us not to be too confident, and that we admit this to be one of the doubtful questions[.]"[43]

2. *The Early Congresses Recognized That States Could Not Add Qualifications*

The early Congresses read the Constitutional qualifications as exclusive. As the Court noted in *Powell*, the House in 1807 seated William McCreery, notwithstanding his failure to meet an in-district residency requirement imposed by the State of Maryland.[44] The contemporaneous understanding of the McCreery case was that it "settled that the States have not a right to require qualifications from members different from, or in addition to, those prescribed by the constitution."[45]

As the *Powell* Court also noted,[46] Congress faithfully adhered to the principle that the constitutional qualifica-

[42] The letter is reprinted in 2 *The Founders' Constitution* 81 (Philip B. Kurland & Ralph Lerner eds., 1987).

[43] *Id.* at 81. USTL also notes (Br. 47) that Judge St. George Tucker approved of Virginia's property ownership requirement for members of Congress as a policy matter; however, Tucker also cautioned that the provision "may be rendered nugatory, by the constitution which imposes no such condition." 1 St. George Tucker, *Blackstone's Commentaries* App. 197 (1803).

[44] In the course of the McCreery debate, the House rejected by a 92-8 vote a motion offered by John Randolph implying that the Maryland qualification was constitutional. 17 *Annals of Cong.* 871-72 (1807). Petitioners rely (RPA Br. 4-5; USTL Br. 46) on Randolph's remarks in advancing their own interpretation of the McCreery debate, but the vote on Randolph's motion makes it clear that his position was resoundingly rejected by the House as a whole.

[45] *Cases of Contested Elections* 171 (M. St. Clair Clarke & David A. Hall eds., 1834) (emphasis deleted).

[46] *See Powell*, 395 U.S. at 542.

tions are exclusive throughout much of the nineteenth century.[47] In particular, the House in 1856 seated Samuel Marshall, even though he was undisputedly disqualified under an Illinois law providing that state judges were not eligible for other offices "during the term for which they were elected, nor for one year thereafter." By doing so, the House endorsed a Committee on Elections report that stated:

> It is a fair presumption that, when the Constitution prescribes the[] qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence.

1 *Hinds' Precedents of the House of Representatives* § 415, at 385 (1907). In the same year the Senate voted by a margin of 35 to 8 to seat Lyman Trumbull, who was purportedly disqualified under the same Illinois law.[48]

---

[47] The only significant exception is one set of incidents after the Civil War. In 1868, the House and Senate each voted to exclude members-elect for giving aid and comfort to the Confederacy. *See Powell*, 395 U.S. at 544 & n.81. This Court described these actions as taken in "'the naked urgency of power'" and without doctrinal support, *id.* at 544, but they may also have been influenced by the impending ratification of the Fourteenth Amendment (proposed in 1866 and ratified in 1868), which explicitly disqualifies such persons. U.S. Const. Amend. XIV. Indeed, the adoption of Section 3 of the Fourteenth Amendment suggests that Congress believed that a constitutional amendment was required to disqualify Confederate soldiers and officers from serving in Congress.

[48] *See State ex rel. Johnson v. Crane*, 197 P.2d 864, 868-69 (Wyo. 1948) (discussing the Trumbull case). *See also* Note, *The Legal Qualifications of Representatives*, 3 Am. L. Rev. 410 (1868-69) (concluding that it was settled law that a state could not add to or otherwise affect the qualifications of its members of Congress).

Petitioners note that Congress has frequently adopted statutes barring certain classes of persons, such as those convicted of bribery and abuse of public office, from "holding any office under the United States."[49] Those statutes prove nothing of relevance to this case. Congress, in barring felons from "all federal office," was not obliged to add the words "except Congress" in order to show that it was not seeking to override the Constitution. No state or federal statute can be constitutionally applied to bar otherwise qualified and duly elected persons from service in Congress,[50] but the adoption of such general statutes does not imply a congressional view on the present question.[51]

---

[49] *See* State Br. 43, *citing* Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281. In the Civil War period, Congress adopted statutes barring from "any office under the United States" any member of Congress who engaged in specified misconduct. *See, e.g.*, USTL Br. 30, *citing* Act of July 16, 1862, ch. 180, 12 Stat. 577; Act of June 11, 1864, ch. 119, 13 Stat. 123. Of course, even when a sitting member of Congress is convicted of a crime, he or she may be removed only by an exercise of the congressional expulsion power. *Burton v. United States*, 202 U.S. 344, 369 (1906).

[50] Every court to consider the question has concluded that felons may not be barred from congressional service. *See Application of Ferguson*, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), *aff'd*, 294 N.Y.S.2d 989 (N.Y. App. Div. 1968); *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *In re O'Connor*, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); *cf. United States v. Richmond*, 550 F. Supp. 605 (E.D.N.Y. 1982) (Weinstein, J.) (portion of felony plea agreement purporting to bar defendant from running for Congress unconstitutional); *see id.* at 607 ("The states are barred from imposing additional qualifications on congressional candidates."); *see also* Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1933-34 (1992).

[51] Similarly, the Religious Test Clause of Art. VI ("no religious Test shall ever be required as a Qualification to any Office of public trust under the United States") sets forth a broad commitment of the new Nation applicable to all federal officials. As applied to members of Congress it was logically unnecessary, but the Framers

3. *All the Prominent Early Constitutional Scholars and a Large and Unanimous Number of Courts Have Interpreted the Constitution as Barring the States (and Congress) From Adding Qualifications*

Joseph Story's *Commentaries on the Constitution of the United States* (1st ed. 1833), the pre-eminent early secondary source for interpretation of the Constitution, addressed the question "whether the states can superadd any qualifications [for service in Congress] to those prescribed by the constitution of the United States." *Id.* § 624. Story's answer was no:

> It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply the negative of all others.

Id. § 625.[52] Other prominent nineteenth century scholars agreed with Story's conclusion. New York's Chancellor

---

were not required to add the (potentially confusing) words "except Congress" in order to eliminate the redundancy.

The State argues (Br. 37-38) that other provisions in the Constitution—Art. I, § 6, cl. 2 (the Incompatibility Clause); Art. I, § 3, cl. 7 (the Impeachment Clause); Art. VI (the Religious Test Clause); Amend. XIV, § 3 (participation in insurrection)—"show that the Qualifications Clauses do not fix the exclusive prerequisites for Congress." But other requirements set forth, originally or subsequently, in the Constitution itself do not suggest that the Founding generation thought Congress or a state could add further qualifications: the point is that the qualifications set forth in the Constitution are exclusive, not that the Qualifications Clauses themselves contain the exclusive list.

[52] Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 112-14 (1991), argues that modern courts generally place less weight on the "expressio unius" principle. But the issue is whether the Founders would have understood the constitutional lists as open or preclusive. In addition to Story, Charles Warren, *The Making*

James Kent said, "The question [is] whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the constitution of the United States . . . . [T]he objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion."[53] Historian George McCrary, who had been a member of the House of Representatives and Chairman of its Committee on Elections, wrote: "It is not competent for any state to add to or in any manner change the qualifications for federal office, as prescribed by the constitution or laws of the United States."[54] And Judge Thomas Cooley observed that "[t]he Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state Constitutions and laws can neither add to nor take away from them."[55]

Twentieth century commentators overwhelmingly share the view of Story, Kent, McCrary, and Cooley. Charles Warren believed that the qualifications established by the Constitution could be supplemented only by federal constitutional amendment.[56] Charles Burdick wrote that "[i]t is clearly the intention of the Constitution that all persons not disqualified by the terms of the instrument should be

---

of the Constitution 421-22 (1928), argues that the Founders would have read the text preclusively.

[53] 1 James Kent, *Commentaries on American Law* 228 n.b (3d ed. 1836).

[54] George McCrary, *A Treatise on the American Law of Elections* 164 (1875).

[55] Thomas Cooley, *The General Principles of Constitutional Law in the United States* 257 (1880). *See also* George Washington Paschal, *The Constitution of the United States, Defined and Carefully Annotated* 66 (1876) ("The Constitution having fixed the qualifications of members, no *additional* qualifications can rightfully be required by the States.").

[56] Warren, *supra* n.52, at 412-26; *see id.* at 422 ("The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").

eligible to the federal office of Representative[.]" [57] And most of those addressing the issue in recent years have reached the same conclusion.[58]

Finally, every federal and state court that has considered the issue has concluded that states, like Congress, may not add to the qualifications established by the Constitution. Courts have struck down state laws imposing term limits on service in Congress [59] as well as laws dis-

---

[57] Charles Burdick, *The Law of the American Constitution* 160, 165 (1929); *see also* William A. Sutherland, *Notes on the Constitution of the United States* 40 (1904) (stating that the Qualifications Clause "fixes the qualifications of members so far as state action is concerned, and no additional qualifications can be required by the state").

[58] Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J.L. & Pub. Policy 1 (forthcoming Nov. 1994); Johnathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 Cornell L. Rev. 966 (1993); Tiffanie Kovacevich, Note, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677 (1992); Troy A. Eid & Jim Kolbe, *The New Anti-Federalism*, 69 Denv. U.L. Rev. 1 (1992); Steven Greenberger, *Democracy and Congressional Tenure*, 41 DePaul L. Rev. 37 (1991); Martin E. Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 Akron L. Rev. 155 (1991); Joshua Levy, *Can They Throw the Bums Out?*, 80 Geo. L.J. 1913 (1992); Brendan Barnicle, *Congressional Term Limits*, 67 Wash. L. Rev. 415 (1992); Erik H. Corwin, *Limits on Legislative Terms*, 28 Harv. J. on Legis. 569 (1991); L. Paige Whitaker, *The Constitutionality of States Limiting Congressional Terms* (Congressional Research Service 1992).

[59] *See Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994); *Stumpf v. Lau*, 839 P.2d 120, 123 (Nev. 1992) (term limit law "'palpably' violates the qualifications clauses of Article I"); *see also Advisory Opinion to the Attorney General*, 592 So. 2d 225, 230-31 (Fla. 1991) (Overton, J. and Kogan, J., dissenting) (majority held that challenge to constitutionality of term limit initiative was not ripe before the initiative was adopted; dissenting justices reached the merits and found that the initiative was plainly unconstitutional under *Powell v. McCormack* and *Davis v. Adams*).

qualifying candidates who (i) failed to meet narrower residency requirements than the Constitution prescribes,[60] or (ii) had been convicted of felonies,[61] or (iii) were suspected of disloyalty,[62] or (iv) failed to meet a variety of other tests.[63] There have been no contrary decisions.

II. CALLING THE ARKANSAS MEASURE A "MERE BALLOT ACCESS" MEASURE DOES NOT SAVE IT FROM UNCONSTITUTIONALITY

Recognizing the force of the case against state power to add qualifications, proponents of term limits formulated the Arkansas Measure as a bar to appearance on the ballot, and they now defend it in this Court as a mere regulation of the "manner" of elections to Congress. Their arguments fail for two reasons. First, however it may be labeled, the Measure is, on its face, an attempt to exclude certain persons from Congress because they

---

[60] *See* n.41 *supra*.

[61] *See* n.50 *supra*.

[62] *See, e.g., Shub v. Simpson*, 76 A.2d 332 (Md.) (anti-subversion declaration requirement unconstitutional), *appeal dismissed*, 340 U.S. 881 (1950); *In re O'Connor*, 17 N.Y.S.2d 758 (N.Y. Sup. Ct. 1940) (disqualification for disloyalty).

[63] *See, e.g., Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970) (three-judge court); *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (Ariz. 1962); *Stockton v. McFarland*, 106 P.2d 328 (Ariz. 1940); *Buckingham v. State ex rel. Killoran*, 35 A.2d 903, 905 (Del. 1944); *Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508 (Ind. 1958); *Richardson v. Hare*, 160 N.W.2d 883, 887-88 (Mich. 1968); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *Riley v. Cordell*, 194 P.2d 857 (Okla. 1948); *Ekwall v. Stadelman*, 30 P.2d 1087 (Or. 1934); *In re Opinion of the Judges*, 116 N.W.2d 233 (S.D. 1962); *State ex rel. Chandler v. Howell*, 175 P. 569 (Wash. 1918); *State ex rel. Wettengel v. Zimmerman*, 24 N.W.2d 504 (Wis. 1946); *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); *see also Cobb v. State*, 722 P.2d 1032 (Haw. 1986) (avoiding constitutional issue by interpreting "resign to run" statute not to apply to candidates for federal positions).

lack the qualification of limited prior experience. Second, in any event, a state has no power (under the Times, Places and Manner Clause of Art. I, § 4 or otherwise) to regulate the manner of elections so as to cripple candidates who *are* qualified, merely because the state believes their continued service would be undesirable.[64]

A. The Arkansas Measure Is Invalid Because It Violates the Principle That States May Not Add Qualifications

Th Arkansas Measure is, on its face, an attempt to exclude from Arkansas' representatives in Congress any person who has exhausted his or her lifetime allotment of allowed congressional service. Its first sentence is a declaration "that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people." Its preamble then states what the Measure does: "Therefore, the people of Arkansas . . . herein limit the terms of elected officials." App. 1a.[65]

---

[64] Some supporters of the Measure argue (*e.g.*, RPA Br. 14-15; WLF Br. 18-20) that, since Congress may "make or alter" Times, Places and Manner ("TPM") regulations, this Court should refrain from adjudicating the constitutionality of the Measure and leave any corrective to Congress. At best, this argument begs the central questions in this case by assuming that the Measure lies within the legislative power conferred on the states and Congress by the TPM Clause; it also contradicts the arguments of other supporters of the Measure (*e.g.*, USTL Br. 13-14, Neb. Br. 4-19), who say that the Measure was adopted under a "residual" power of the states. But even if the only question were whether the Measure is constitutional as a TPM regulation, it is far too late to suggest that this Court should refrain from adjudicating, and leave to Congress, a claim that a state election regulation violates federal constitutional rights. Federal courts, including this Court, have repeatedly decided such claims on their merits. *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974), and cases cited in notes 76-77 *infra; cf. Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (TPM Clause does not render election issues non-justiciable).

[65] The adoption of the Arkansas Measure by referendum rather than by the state legislature does not affect its constitutionality.

[Footnote continued]

Petitioners argue half-heartedly that the Measure does not actually bar the disfavored candidates from serving in Congress because a write-in candidacy is feasible. But they know that only one write-in candidate has ever been elected to Congress from Arkansas, *see* State Br. 35, and only a handful have been elected from all other states combined.[66] They counted on the difficulty of write-in campaigns to achieve their stated goal to "limit the terms of elected officials."[67] The issue is whether states may erect barriers that seek to exclude certain persons because of a personal characteristic unrelated to their participation in the current electoral process—not whether a barrier is completely impermeable or slightly porous.

Some on the petitioners' side argue that a "qualification" is by definition a characteristic required for formal eligibility to serve, and that even a provision that makes it "impossible as a practical matter for certain individuals to win elections" is not a qualification provision. *See* DH

---

[65] [Continued]

See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736 (1964).

[66] In the thousands of House races since 1958, only three write-in candidates have won. Only one Senator (in 1954) has won on a write-in vote since the passage of the Seventeenth Amendment in 1913. M. Barone & G. Ujifusa, *The Almanac of American Politics 1994*, at 203, 847, 1143 (1993). No write-in candidate has ever been elected to Congress from Washington, the other state with a recent term limits measure that has received judicial scrutiny. *Thorsted*, 841 F. Supp. at 1079-80.

[67] This Court has repeatedly recognized the difficulty. "[The] opportunity [to cast write-in votes] is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 799 n.26 (1983). *See Burdick v. Takushi*, 112 S. Ct. 2059, 2065 n.7 (1992) ("It is clear under our decisions that the availability of a write-in option would not provide an adequate remedy" for an otherwise unconstitutional bar against appearing on the ballot); *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (" 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot").

Br. 3. Even as a dictionary exercise, this argument is wrong. Most of the cited definitions of "qualification" (State Br. 28-29; DH Br. 14-15) comfortably cover a personal characteristic, specified by law, that will almost always be required as a practical matter to achieve a desired office.[68]

But petitioners' dictionary argument also misses the point. The question in this case is not, strictly speaking, whether limited prior service "is" a qualification, but whether the Measure violates the principle that the qualifications "fixed in the Constitution" may not be supplemented. The Measure does violate that principle in both intent and practice: it seeks to exclude from Congress persons who have what the state deems excessive prior service, and it will almost always succeed. If a state, seeking to impose an occupational qualification but hoping to escape the *Powell* principle, adopted a statute barring non-lawyers from being listed on the ballot, the Court would promptly strike it down as an invalid attempt to impose an additional qualification. The Arkansas Measure deserves the same swift fate.

Storer v. Brown, 415 U.S. 724 (1974), which is further discussed at pages 35-36 *infra*, is entirely consistent with this view. There, the Court correctly rejected a contention that an election ground rule, with which any would-be candidate could have complied, imposed an "additional qualification." *Id.* at 746 n.16. Nothing in *Storer* rescues a measure aimed at defeating certain persons because of

---

[68] *See* 1 William Blackstone, *Commentaries on the Laws of England* 169-70 (1st ed. 1765) ("qualifications" are attributes that render members "capable of being elected"); 2 *Farrand* 250 (Madison) (qualifications are established by laws "limiting the numbers [of persons] capable of being elected"); 2 Samuel Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773) (defining "to qualify" as "To fit for any thing" or "To make capable of any employment or privilege"); Thomas Dyche, *A New General English Dictionary* (1777) ("something that enables or empowers a person to do that which otherwise he could not").

a personal characteristic unrelated to their participation in the current election process. The real significance of *Storer* is that the question there presented would not have arisen if states were not barred from adding qualifications.[69]

Petitioners argue (*e.g.*, USTL Br. 17-25) that the Measure is merely an attempt to level the playing field against the advantages of incumbency, but with all respect that argument is frivolous. First, the Measure is not limited to current incumbents: anyone who has served three terms in the House or two in the Senate is barred from the ballot for life. Second, the Measure does not deal rationally with any such advantages: if the supposed advantage lies in incumbency itself, there is no reason why the Measure should operate only after three or two terms; and if the supposed advantage lies in length of continuous service, there is no reason why the Measure should count terms that are not consecutive and may be separated by many years in private life. Third, the record contains no evidence of any effort to calibrate the advantages of incumbency so as to achieve a genuinely level playing field; there was none, because that was not the Measure's purpose. Finally, a deliberate state effort to neutralize the perceived advantages of one set of candidates (whether flowing from personal wealth, or name recognition, or past service in Congress or other posts) would not only violate the *Powell* principle but also raise other serious constitutional problems.[70]

---

[69] *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985), and *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd mem.*, 992 F.2d 1548 (11th Cir. 1993), both suggest that the right to run a write-in campaign will turn what would otherwise be considered an impermissible "qualification" into a permissible "ballot access restriction." But both cases involved election-procedure ground rules of the type repeatedly upheld by this Court (*see* pages 36-37 *infra*), not attempts to exclude undesired classes of persons.

[70] *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of

As we have shown, the constitutional principle was that the door to service in Congress was to be "open to merit of every description," *The Federalist* No. 52, at 355 (Madison), and that "No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist* No. 57, at 385 (Madison). State exclusion from the ballot of persons who have exhausted their allowed period of service, or are non-lawyers, or have not served in the state legislature is a violation of that principle and ought to be struck down as such.

B. The Arkansas Measure Is Invalid Because a State Does Not Have the Power To Exclude a Qualified Candidate (Who Has Complied with All Applicable Election-Related Requirements) From the Ballot

It is not essential to our position that the Court agree with us that the Arkansas Measure is an attempt to impose an additional qualification, because the other horn of the dilemma is equally lethal for petitioners. A state has no power to bar from the ballot a set of candidates who (by hypothesis) *are* legally qualified and who have complied with all applicable procedural requirements. It has no such power either under the Times, Places and Manner ("TPM") Clause of Art. I, § 4 (as some proponents of term limits urge) or under some inherent power of states (as others urge).

1. *State Power Under the TPM Clause*

The TPM Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."); *id.* at 54 (holding that offsetting the natural advantage of a wealthy candidate is an insufficient reason to justify a limit on candidate's expenditure of personal resources).

The states' power under the TPM Clause is broad, but it is procedural.[71] States may adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). They may impose ground rules designed to make elections "fair and honest" and impose "some sort of order, rather than chaos" on the electoral process, *see Burdick*, 112 S. Ct. at 2063, or to prevent "voter confusion, ballot overcrowding, or the presence of frivolous candidates[.]" *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986). They may not, however, adopt rules whose purpose is to bar or cripple candidates because of an undesired personal characteristic such as too much experience; such rules simply are not "time, place and manner" regulations, as logic and history show.

If the TPM Clause empowered a state to exclude from the ballot any class of constitutionally qualified persons as to whom it could make a plausible case that their service is undesirable, a state could circumvent the entire notion of a Congress "open to merit of every description." It could bar, for example, non-lawyers,[72] or felons, or candi-

[71] *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.").

[72] *Cf.* 2 *Farrand* 250 (comments of Hugh Williamson) (noting that if qualifications were not fixed in the Constitution, a future statute could require that all members of Congress be lawyers).

dates under age forty, or candidates without prior military service, or persons who have not served in the state legislature. Congress would have even greater power, because the Clause says Congress may by law "make or alter such Regulations."[73] Congress presumably could, for example, exclude from the ballot for the Senate any person who has *not* served in the House. The only check on these nightmares would be a new due process and equal protection jurisprudence that this Court would have to develop (under amendments that were not part of the Constitution when the TPM Clause was adopted).

Fortunately, it has been clear since the adoption of the Constitution that the TPM Clause confers power only to establish election procedures, not to skew outcomes against persons with undesired characteristics. Hamilton addressed that point directly in *The Federalist* No. 60. That essay is devoted to answering arguments that the *national* government has too much power over congressional elections. In the penultimate paragraph, Hamilton responds as follows to the concern that Congress might contrive to favor the wealthy:

> The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority [under the "make or alter such Regulations" power] would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.

Id. at 408-09 (emphasis Hamilton's). If, as Hamilton was explicitly telling the world, the TPM Clause confers only a procedural power that cannot be used by Congress to

[73] *Cf. Oregon v. Mitchell*, 400 U.S. 112, 119-28 (1970) (upholding congressional power under TPM Clause to set uniform minimum age for voters in federal elections).

favor the rich, the same Clause plainly confers no power on Arkansas to favor the inexperienced.

The language of the Clause also demonstrates that its reach, while broad, is procedural. The Clause speaks of the "Manner *of holding Elections* for Senators and Representatives" (emphasis added), rather than the "Manner of electing . . . ." The phrase chosen focuses on the election process. And of course, as Hamilton explicitly recognized, the words "Times, Places and Manner" were chosen because they are words of process. This Court has borrowed the phrase from Article I, § 4 and used it repeatedly in speech regulation cases. *See, e.g., City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994). As used in those cases, the phrase signifies procedural rules that restrict speech opportunities but do so in a speaker- and content-neutral manner. The Court's borrowed usage reflects, we suggest, its understanding that when the Framers coined the phrase, they meant to signify procedural rather than substantive rules.

No case in this Court (or any other court to our knowledge) suggests that the TPM Clause empowers a state (or Congress) to impose rules that deliberately hobble a class of undesired candidates in order to make it harder for them to win. In particular, *Storer*, 415 U.S. at 724, is entirely consistent with our argument here. The issue in *Storer* was whether California could bar a candidate from appearing as an "independent" on the general election ballot because he had within the previous year been a registered member of a political party. The Court recognized that California had a legitimate interest in "attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot." *Id.* at 729. The Court explained that California had established two "route[s] to obtaining ballot position," *id.* at 733, "independent candidacy" and "the direct party primaries." *Id.* It then sustained the California provision on the ground that it "maintain[ed] the integrity of the various

routes to the ballot." *Id.*[74] It noted as it did so that the provision "involves no discrimination against independents." [75]

Under the TPM Clause, states may of course bar candidates from the ballot in order to assure an orderly and fair election process by preventing "voter confusion, ballot overcrowding, or the presence of frivolous candidates[.]" *Munro*, 479 U.S. at 194-95. It may, for example, bar candidates who have lost a primary, or otherwise failed to demonstrate sufficient support, or seek to circumvent the party system by posing as independents.[76] But no case suggests that a state may bar qualified candidates from the ballot because they possess a characteristic unrelated to the election process (*e.g.*, the wrong "civil profession" or, as here, excessive experience) that the state deems undesirable.

---

[74] The Court, 415 U.S. at 735, explained:

> [The law] protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidates prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

[75] *Id.* at 733. Dickey and Hutchison argue (Br. at 28-29) that the Arkansas Measure involves no discrimination because it applies equally to every person who has exhausted the allowed period of service. But a statute barring all doctors from the ballot, on the theory that doctors make bad legislators, would apply equally to all doctors and could be avoided by not going to medical school, and nevertheless would not be within the TPM power. Contrary to DH Br. 28, the Court has struck down requirements that disadvantaged one of the two major parties. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

[76] In addition to *Munro*, *see American Party of Texas v. White*, 415 U.S. 767 (1974) (upholding petition requirement for independents and minor parties); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding 11-month party registration requirement).

Even election-procedure ground rules have, of course, been subject to frequent challenge under the First and Fourteenth Amendments. Since restrictions on participation in the electoral process "implicate[] basic constitutional rights," *Anderson*, 460 U.S. at 786; *accord Williams v. Rhodes*, 393 U.S. 23, 30 (1968), any "severe restriction" must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 112 S. Ct. 698, 705 (1992); *accord Burdick*, 112 S. Ct. at 2063. And any such restriction must be "reasonable [and] nondiscriminatory." *Burdick*, 112 S. Ct. at 2063. Under these standards, the Court has sometimes sustained and sometimes struck down petition requirements, primary election requirements, party registration requirements and filing fees.[77]

But the Court should not even reach the First and Fourteenth Amendment issues in this case, because the Arkansas Measure is fundamentally different from all of these measures. It is not intended to "protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at 788 n.9, but to make it harder or impossible for persons who have exhausted their allowed periods of service to win. Such a Measure obviously is

---

[77] *Compare Norman v. Reed*, 112 S. Ct. 698 (1992) (striking down requirement that more signatures be obtained to appear on local ballot than are required to appear on statewide ballot); *Anderson*, 460 U.S. at 780 (striking down early deadline for submission of petitions) *with American Party v. White*, 415 U.S. at 767 (upholding petition requirement); *compare McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., Circuit Justice) (striking down requirement that candidate be a member of a political party in order to compete in general election); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (striking down requirement that party hold primary open only to its members) *with Munro*, 479 U.S. at 189 (upholding primary election requirement); *compare Kusper v. Pontikes*, 414 U.S. 51 (1973) (striking down 23-month registration requirement) *with Rosario v. Rockefeller*, 410 U.S. at 752 (upholding 11-month requirement); *see Lubin v. Panish*, 415 U.S. 709 (1974) (striking down excessive filing fees).

not "nondiscriminatory,"[78] but the more fundamental objection to it is that Arkansas has no power to adopt a Measure whose express purpose is skewing congressional races against disfavored candidates—that, in one court's words, "hobbles a few runners to make sure they lose." *Thorsted*, 841 F. Supp. at 1082.

2. *State "Reserved" Powers*

Some supporters of the Arkansas Measure (USTL Br. 13-14; Neb. Br. 4-19) argue that Arkansas could adopt the Measure without relying on the TPM Clause, pursuant to a "reserved" power confirmed by the Tenth Amendment. This argument of course contradicts the argument of other supporters who suggest that the Court take comfort from the fact that Congress may supersede the Measure under the "make or alter" power conferred by the TPM Clause. More fundamentally, it contradicts the constitutional text, by suggesting that states have a power to regulate congressional elections that is *not* subject to congressional supersession under the "make or alter" power.

Story answered this point more than 150 years ago. The offices of Senator and Representative were created by

[78] We agree with and will not repeat the arguments of Amicus The League of Women Voters of the United States that the Measure, even if it were otherwise valid, would violate the First and Fourteenth Amendments. Petitioners argue (*e.g.*, State Br. 33 n.38) that this cannot be so, because term limits applicable to *state* officials have generally been sustained against such a challenge. But the situations are entirely different: a state may, if it chooses, impose a length-of-service disqualification on state offices. *See Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers"). It may not discriminate against congressional candidates who *are* constitutionally qualified. Contrary to the views expressed by certain amici (Neb. Br. 10-11), Senators and Representatives are not state officers; they are federal officers elected "by the people." *See Gregory v. Ashcroft*, 501 U.S. 452, 458-62 (1991); *cf. Oregon v. Mitchell*, 400 U.S. at 125 (distinguishing state power over federal elections from power over state and local elections).

the Constitution itself, and the Constitution provides comprehensively for filling them. The Constitution gives the states a large role, but they have no other, "residual" powers:

> [T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the union, deriving his powers and qualifications from the constitution. . . . It is no original prerogative of state power to appoint a representative, a senator, or president for the union. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people. . . . No state can say, that it has reserved, what it never possessed.

2 Story, *Commentaries* § 627 (1st ed. 1833).[79]

The text of the Constitution clearly demonstrates an intention to deal with all aspects of elections to Congress. *See* page 2 *supra*. The whole arrangement is discussed extensively in *The Federalist* Nos. 52-61 in a manner that clearly reflects the understanding of Madison and Hamilton that the Constitution's handling of the subject was comprehensive; states have broad and important powers within the constitutional framework, but none outside it.

Finally, several courts, including this Court, have upheld statutes barring state officials from running for Con-

[79] Citizens United Foundation argues (Br. at 24-25) that under the Articles of Confederation the states "always held the authority to define the qualifications of their representatives to the national legislature." But the Constitution changed that, deliberately, because one of its purposes was to limit the power of the states over the national government. *See The Federalist* No. 52, at 354 (Madison); 1 *Farrand* 19 (remarks of Edmund Randolph) (primary defect of the Confederation was "that the federal government could not defend itself against the incroachments from the states").

gress while holding state office. *See, e.g., Clements v. Fashing*, 457 U.S. 957 (1982) (upholding a "resign to run" requirement, without reference to the Qualifications Clause); *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980). As *Joyner* and *Signorelli* made clear, the theory of these cases is not that a state has a reserved power to regulate congressional elections, but that a state (like any other employer, public or private) has a legitimate interest in regulating the conduct and activities of its own officials and can say, "Not while you work here." State laws barring state officials from running for Congress even after resigning their state offices have been struck down. *See Joyner*, 706 F.2d at 1528-29 & n.4.

The Tenth Amendment does not confer powers that did not exist before the Constitution was adopted, nor does it create exceptions where the Constitution has comprehensively dealt with a subject itself. *New York v. United States*, 112 S. Ct. 2408, 2417-18 (1992); *United States v. Darby*, 312 U.S. 100, 123-24 (1941). States have broad power to prescribe "the Times, Places and Manner of holding Elections," but this power flows from the Constitution itself, where it is expressly subject to congressional supersession, and neither a state nor Congress may use it for the purpose of defeating qualified but undesired candidates.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

ELIZABETH J. ROBBEN
Counsel of Record
JEFFREY H. MOORE
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AK 72201-3493
(501) 376-2011

LOUIS R. COHEN
W. HARDY CALLCOTT
ROBERT F. HOYT
PETER B. HUTT II
ERIK H. CORWIN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Respondents Bobbie E. Hill, on Behalf of the League of Women Voters of Arkansas, and Dick Herget

October 17, 1994

APPENDIX

APPENDIX

The Arkansas Term Limitation Amendment (in relevant part)

PREAMBLE: The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

SECTION 3—Congressional Delegation:

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

U.S. Const. Art. I, § 2, cl. 1

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

U.S. Const. Art. I, § 2, cl. 2

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const. Art. I, § 3, cl. 1

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

U.S. Const. Art. I, § 3, cl. 3

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. Const. Art. I, § 4, cl. 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 5, cl. 1 (in relevant part)

Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members[.]

U.S. Const. Art. VI, cl. 3 (in relevant part)

[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. XIV, § 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Const. Amend. XVII, cl. 1

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.